IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-03326-REB-CBS

Dr. JAMES C. DOBSON, and
FAMILY TALK

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor,
UNITED STATES DEPARTMENT OF LABOR,
JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury, and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs ask this Court to enjoin regulations that are intended to accommodate religious exercise while helping to ensure that women have access to health coverage, without cost-sharing, for preventive services that medical experts deem necessary for women's health and well-being. Subject to an exemption for houses of worship and their integrated auxiliaries, and accommodations for certain other non-profit religious organizations, as discussed below, the regulations require certain group health plans and health insurance issuers to provide coverage, without cost-sharing (such as a copayment, coinsurance, or a deductible), for, among other things, all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.

When the contraceptive-coverage requirement was first established, in August 2011, certain non-profit religious organizations objected on religious grounds to having to provide contraceptive coverage in the group health plans they offer to their employees. Although, in the government's view, these organizations were mistaken to claim that an accommodation was required under the First Amendment or the Religious Freedom Restoration Act (RFRA), the defendant Departments decided to accommodate the concerns expressed by these organizations. First, they established an exemption for the group health plans of houses of worship and their integrated auxiliaries (and any associated group health insurance coverage). In addition, they established accommodations for the group health plans of eligible non-profit religious organizations, like plaintiff Family Talk (and any associated group health insurance coverage), that relieve them of responsibility to contract, arrange, pay, or refer for contraceptive coverage or services, but that also ensure that the women who participate in these plans are not denied access to contraceptive coverage without cost-sharing. To be eligible for an accommodation, the organization merely needs to certify that it meets the

eligibility criteria, *i.e.*, that it is a non-profit organization that holds itself out as religious and has a religious objection to providing coverage for some or all contraceptives. Once the organization certifies that it meets these criteria, it need not contract, arrange, pay, or refer for contraceptive coverage or services. If the organization has third-party insurance, the third-party insurer takes on the responsibility to provide contraceptive coverage to the organization's employees and covered dependents. If the group health plan of the organization is self-insured—like Family Talk's—its third-party administrator (TPA) has responsibility to arrange contraceptive coverage for the organization's employees and covered dependents. In neither case does the objecting employer bear the cost (if any) of providing contraceptive coverage; nor does it administer such coverage; nor does it contract or otherwise arrange for such coverage; nor does it refer for such coverage.

Remarkably, plaintiffs now declare that these accommodations themselves violate their rights under RFRA and the First Amendment. They contend that the mere act of certifying that Family Talk is eligible for an accommodation is a substantial burden on its religious exercise because, once it makes the certification, its employees will be able to obtain contraceptive coverage through other parties. This extraordinary contention suggests that plaintiff not only seeks to avoid paying for, administering, or otherwise providing contraceptive coverage itself, but also seeks to prevent the women who work for the organization from obtaining such coverage, even if through other parties. At bottom, plaintiffs' position seems to be that any asserted burden, no matter how *de minimis*, amounts to a substantial burden under RFRA. That is not the law. Congress amended the initial version of RFRA to add the word "substantially," and thus made clear that "any burden" would not suffice.

Plaintiffs' motion for preliminary injunction should be denied because plaintiffs have not shown that they are likely to succeed on the merits of any of their claims. As an initial matter, Dr. Dobson lacks standing because the preventive services coverage

provision and accommodations he challenges do not apply to him; they apply only to group health plans, health insurance issuers, and eligible organizations. With respect to plaintiffs' RFRA claim, plaintiffs cannot establish a substantial burden on their religious exercise—as they must—because the regulations do not require plaintiffs to change their behavior in any significant way. Plaintiffs are not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, plaintiffs are free to continue to refuse to do so, to voice their disapproval of contraception, and to encourage Family Talk's employees to refrain from using contraceptive services. Family Talk is required only to inform its TPA that it objects to providing contraceptive coverage, which it has done or would have to do voluntarily even absent these regulations in order to ensure that it is not responsible for contracting, arranging, paying, or referring for such coverage. Family Talk can hardly claim that it is a violation of RFRA to require it to do almost exactly what it would do in the ordinary course. *See Priests for Life v. HHS*, __ F. Supp. 2d __, 2013 WL 6672400, at *5-10 (D.D.C. Dec. 19, 2013) (addressing these regulations), *injunction pending appeal granted*, No. 13-5368 (D.C. Cir. Dec. 31, 2013); *Univ. of Notre Dame v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6804773, at *7-14 (N.D. Ind. Dec. 20, 2013) (same), *injunction pending appeal denied*, No. 13-3853 (7th Cir. Dec. 30, 2013); *Michigan Catholic Conf. v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707, at *4-8 (W.D. Mich. Dec. 27, 2013) (same), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013). And the regulations do not require anything of Dr. Dobson, as they govern only Family Talk.

Plaintiffs' First Amendment claims are equally meritless. Indeed, nearly every court to consider similar First Amendment challenges to the regulations has rejected the claims. Finally, plaintiffs cannot satisfy the remaining requirements for obtaining a preliminary injunction.[1]

[1] Plaintiffs have requested oral argument. Defendants do not believe oral argument is necessary but do not oppose it if the Court believes it would be helpful.

BACKGROUND

Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), AR at 317-18, 407. [2] Section 1001 of the ACA— which includes the preventive services coverage provision relevant here—seeks to cure this problem by making preventive care accessible and affordable for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).[3]

Because there were no existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services (HHS) requested that the Institute of Medicine (IOM) develop recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women. IOM REP. at 2, AR at 300.[4] After conducting an extensive science-based

[2] Where appropriate, defendants have provided parallel citations to the Administrative Record (AR), which is being filed contemporaneously with this brief.

[3] This provision also applies to immunizations, cholesterol screening, blood pressure screening, mammography, cervical cancer screening, screening and counseling for sexually transmitted infections, domestic violence counseling, depression screening, obesity screening and counseling, diet counseling, hearing loss screening for newborns, autism screening for children, developmental screening for children, alcohol misuse counseling, tobacco use counseling and interventions, well-woman visits, breastfeeding support and supplies, and many other preventive services. *See, e.g.*, U.S. Preventive Services Task Force A and B Recommendations, http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm.

[4] IOM, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. IOM REP. at iv, AR at 289.

review, IOM recommended that HRSA guidelines include, among other things, well-woman visits; breastfeeding support; domestic violence screening; and, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10-12, AR at 308-10. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices ("IUDs"). *See id.* at 105, AR at 403. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. *See id.* at 102-03, AR at 400-01.[5]

On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84. [6] Group health plans established or maintained by these religious employers (and associated group health insurance coverage) are exempt from any requirement to cover contraceptive services consistent with HRSA's guidelines. *See id.*; 45 C.F.R. § 147.131(a).

[5] At least twenty-eight states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (June 2013), AR at 1023-26.

[6] To qualify for the religious employer exemption contained in the 2011 amended interim final regulations, an employer had to meet the following criteria:

(1) The inculcation of religious values is the purpose of the organization;
(2) the organization primarily employs persons who share the religious tenets of the organization;
(3) the organization serves primarily persons who share the religious tenets of the organization; and
(4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011), AR at 220.

In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the 2011 amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012), AR at 213-14. The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services. *Id.* at 8728, AR at 215. The regulations challenged here (the "2013 final rules") represent the culmination of that process. *See* 78 Fed. Reg. 39,869 (July 2, 2013), AR at 1-31; *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)), AR at 186-93; 78 Fed. Reg. 8456 (Feb. 6, 2013) (Notice of Proposed Rulemaking (NPRM)), AR at 165-85.

The 2013 final rules represent a significant accommodation by the government of the religious objections of certain non-profit religious organizations while promoting two important policy goals. The regulations provide women who work for non-profit religious organizations with access to contraceptive coverage without cost sharing, thereby advancing the compelling government interests in safeguarding public health and ensuring that women have equal access to health care. The regulations advance these interests in a narrowly tailored fashion that does not require non-profit religious organizations with religious objections to providing contraceptive coverage to contract, pay, arrange, or refer for that coverage.

The 2013 final rules simplify and clarify the religious employer exemption by eliminating the first three criteria and clarifying the fourth criterion. *See supra* n. 6. Under the 2013 final rules, a "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended," which refers to

churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a). The changes made to the definition of religious employer in the 2013 final rules are intended to ensure "that an otherwise exempt plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer hires or serves people of different religious faiths." 78 Fed. Reg. at 39,874, AR at 6.

The 2013 final rules also establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). *Id.* at 39,875-80, AR at 7-12; 45 C.F.R. § 147.131(b). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75, AR at 6-7.

Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer or TPA. *Id.* at 39,878-79, AR at 10-11. Its participants and beneficiaries, however, will

still benefit from separate payments for contraceptive services without cost sharing or other charge. *Id.* at 39,874, AR at 6. In the case of an organization with an insured group health plan, the organization's health insurance issuer, upon receipt of the self-certification, must provide separate payments to plan participants and beneficiaries for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id.* at 39,875-77, AR at 7-9. In the case of an organization with a self-insured group health plan—such as Family Talk—the organization's TPA, upon receipt of the self-certification, must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id.* at 39,879-80, AR at 11-12. Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id.* at 39,880, AR at 12.[7]

STANDARD OF REVIEW

To obtain a preliminary injunction, a plaintiff must make "a clear showing" that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008).

ARGUMENT

I. DR. DOBSON LACKS STANDING

Plaintiffs' request for a preliminary injunction as to the claims of Dr. Dobson should be denied at the outset because Dr. Dobson lacks standing. "[T]he irreducible

[7] The 2013 final rules generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, *see* 78 Fed. Reg. at 39,872, AR at 4, except that the amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013, *see id.* at 39,871, AR at 3.

constitutional minimum of standing" requires that a plaintiff (1) have suffered an injury in fact, (2) that is caused by the defendant's conduct, and (3) that is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As to the injury prong, a plaintiff must demonstrate that he has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (quotations omitted). The requirement of a causal connection between the defendant's conduct and the plaintiff's injury means that the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (citation omitted).

Here, Dr. Dobson cannot show that he is injured at all—let alone that his alleged injury stems from the challenged regulations—because the law he challenges *does not apply to him*. The preventive services coverage provision applies to "group health plans" and "health insurance issuers," 42 U.S.C. § 300gg-13; 45 C.F.R. § 147.130(a)(1) ("[A] group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services."), and the accommodations pertain to "eligible organizations," 29 C.F.R. § 2590.715-2713A(a), (b). Dr. Dobson is none of these. Thus, the only provision that Dr. Dobson challenges imposes no direct obligation or requirement on him. The obligations imposed by the challenged regulations are instead placed on Family Talk's group health plan. And, under the accommodations, the self-certification form may be signed by any individual authorized to make the necessary certification *on behalf of the organization*; Dr. Dobson is not required to do it. Dr. Dobson's attempt to piggyback his claims onto those of Family Talk fails as a matter of law. *See, e.g.*, *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001) ("Generally, if a harm has been directed toward the corporation, then only the corporation has standing to assert a claim[.]"); *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994) ("It is considered a

fundamental rule that [a] shareholder—even the sole shareholder—does not have standing to assert claims alleging wrongs to the corporation."); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) ("[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 623 (6th Cir. 2013). For similar reasons, the relief plaintiffs seek—an injunction exempting Family Talk from the accommodations and the contraceptive coverage requirement—does not follow from any alleged injury to Dr. Dobson. The Court, therefore, should deny plaintiffs' motion for preliminary injunction as to Dr. Dobson for lack of jurisdiction.[8]

II. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON ANY OF THEIR CLAIMS

A. Plaintiffs' Religious Freedom Restoration Act Claim Fails

Under RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1 *et seq.*), the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1. Importantly, "only *substantial* burdens on the exercise of religion trigger the compelling interest requirement." *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (emphasis added). "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (citing *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling*, 553 F.3d at 678; *see Garner v. Kennedy*,

[8] The Complaint also appears to allege claims on behalf of Dr. Dobson as an employee of Family Talk. But plaintiffs have not raised those claims in their motion for preliminary injunction, so defendants do not address them here other than to note that any such claims are also jurisdictionally barred and fail on the merits.

713 F.3d 237, 241-42 (5th Cir. 2013) ("In order to show a substantial burden, the plaintiff must show that the challenged action 'truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.'").

Plaintiffs cannot show—as they must—that the challenged regulations substantially burden their religious exercise. Plaintiffs contend the Tenth Circuit's decision in *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc) "strongly suggests" there is a substantial burden here, Pls.' Mem. at 12 (ECF No. 19), but it does not. *Hobby Lobby* addressed the RFRA claim of for-profit corporations, which, unlike Family Talk, are not eligible for the accommodations and thus are required by the regulations to contract, arrange, and pay for contraceptive coverage for their employees. The court had no occasion to consider whether the regulation's accommodations, which relieve eligible non-profit religious organizations like Family Talk of any obligation to contract, arrange, pay, or refer for contraceptive coverage, impose a substantial burden on religious exercise. They do not for the reasons discussed below.

The regulations do not impose a substantial burden on plaintiffs because they do not require plaintiffs to modify their behavior in any meaningful way. *See Priests for Life*, 2013 WL 6672400, at *5-10; *Notre Dame*, 2013 WL 6804773, at *7-14; *Michigan Catholic Conf.*, 2013 WL 6838707, at *4-8. To put this case in its simplest terms, plaintiffs challenge regulations that require them to do next to nothing, except what they would have to do even in the absence of the regulations. As explained above, the regulations require nothing of Dr. Dobson, and thus do not impose any burden on his religious exercise, much less a substantial burden. Moreover, Family Talk, as an eligible organization, is not required to contract, arrange, pay, or refer for contraceptive coverage. To the contrary, it is free to continue to refuse to do so, to voice its disapproval of contraception, and to encourage its employees to refrain from using contraceptive services. Family Talk need only fulfill the self-certification requirement and

provide the completed self-certification to its TPA. It need not provide payments for contraceptive services to its employees. Instead, a third party—Family Talk's TPA—provides payments for contraceptive services, at no cost to Family Talk. In short, with respect to contraceptive coverage, Family Talk need not do any thing more than it did prior to the promulgation of the challenged regulations—that is, to inform its TPA that it objects to providing contraceptive coverage in order to ensure that it is not responsible for contracting, arranging, paying, or referring for such coverage. Thus, the regulations do not require plaintiffs "to modify [their] religious behavior in any way." *Kaemmerling*, 553 F.3d at 679. The Court's inquiry should end here. A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiffs'] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiffs] engage[]." *Kaemmerling*, 553 F.3d at 679.

Because the regulations place no burden *at all* on plaintiffs, they plainly place no cognizable burden on their religious exercise. Plaintiffs' contrary argument rests on an unprecedented and sweeping theory of what it means for religious exercise to be burdened. Not only does Family Talk want to be free from contracting, arranging, paying, or referring for contraceptive services for its employees—which, under these regulations, it is—but Family Talk would also prevent *anyone else* from providing such coverage to its employees and their covered dependents, who might not subscribe to Family Talk's religious beliefs. That this is the *de facto* impact of plaintiffs' stated objections is made clear by their assertion that RFRA is violated whenever Family Talk "trigger[s]" a third party's provision to Family Talk's employees of services to which Family Talk objects. Compl. ¶¶ 6, 126 (ECF No. 1). This theory would mean, for example, that even the government would not realistically be able to provide contraceptive coverage to Family Talk's employees, because such coverage would be "trigger[ed]," *id.*, by Family Talk's objection to providing such coverage itself. But RFRA is a shield, not a sword, *see O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo.

2012), and accordingly it does not prevent the government from providing alternative means of achieving important statutory objectives once it has provided a religious accommodation. *Michigan Catholic Conf.*, 2013 WL 6838707, at * 8 ("The fact that the scheme will continue to operate without them may offend Plaintiffs' religious beliefs, but it does not substantially burden the exercise of those beliefs."); *Notre Dame*, 2013 WL 6804773, at *8 ("Boiled to its essence, what Notre Dame essentially claims is that the government's action after Notre Dame opts out, in requiring the TPA to cover contraception, offends Notre Dame's religious sensibilities. And while I accept that the government's and TPA's actions do offend Notre Dame's religious views, it's not Notre Dame's prerogative to dictate what healthcare services third parties may provide."); *cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

Plaintiffs' RFRA challenge is similar to the claim that the D.C. Circuit rejected in *Kaemmerling*. There, a federal prisoner objected to the FBI's collection of his DNA profile. 553 F.3d at 678. In concluding that this collection did not substantially burden the prisoner's religious exercise, the court reasoned that "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)." *Id.* at 679. In the court's view, "[a]lthough the government's activities with his fluid or tissue sample after the BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not pressure [him] to modify his behavior and to violate his beliefs." *Id.* (internal citation and quotation marks omitted). The same is true here, where the provision of contraceptive services is "entirely [an] activit[y] of [a third party], in which [plaintiffs] play[] no role." *Id.* As in *Kaemmerling*, "[a]lthough the [third party]'s activities . . . may offend [plaintiffs'] religious beliefs, they cannot be said to hamper [their] religious exercise." *Id.*

Perhaps understanding the tenuous ground on which their RFRA claim rests, given that the regulations do not require Family Talk to contract, arrange, pay, or refer for contraceptive services, plaintiffs attempt to circumvent this problem by framing the allegation in their complaint as part of a novel theory that the regulations require Family Talk to somehow "facilitate[] " access to contraception coverage, and that it is this facilitation that violates plaintiffs' religious beliefs. *See, e.g.*, Compl. ¶ 128; Pls.' Mem. at 11. But under the challenged regulations Family Talk need *only* to self-certify that it objects to providing coverage for contraceptive services and that it otherwise meets the criteria for an eligible organization, and to share that self-certification with its TPA. In other words, Family Talk is required to inform its TPA that it objects to providing contraceptive coverage, which it has done or would have to do voluntarily anyway even absent these regulations in order to ensure that it is not responsible for contracting, arranging, paying, or referring for contraceptive coverage. The sole difference is that it must inform its TPA that its objection is for religious reasons—a statement which it has already made repeatedly in this litigation and elsewhere. [9] This does not amount to a substantial burden under RFRA. *Michigan Catholic Conf.*, 2013 WL 6838707, at *7 ("[T]he contraceptive mandate requires Catholic Charities to do what it has always done—sponsor a plan for its employees, contract with a TPA, and notify the TPA that it objects to providing contraceptive coverage. Thus, Plaintiffs are not require[d] to 'modify [their] behavior.' . . . Although the TPA's action may be deeply offensive to the religious beliefs of Plaintiffs, RFRA does not allow a plaintiff to restrain the behavior of a third party that conflicts with the plaintiff's religious beliefs.") (citation omitted); *Notre Dame*,

[9] At several points in their brief, plaintiffs mention that for self-insured eligible organizations, the self-certification form acts "as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879, AR at 11; *see also* Pls.' Mem. at 13 & n.4, 29. It is not clear what legal significance plaintiffs attach to this statement, but what is clear is that self-insured entities are subject to the exact same self-certification requirement as third-party-insured entities; they will use the same self-certification form, on which they will state only that they have a religious objection to providing contraceptive coverage—nothing more. As discussed above, this self-certification requirement is, at most, a *de minimis* administrative burden that requires no more of eligible employers—whether self-insured or third-party-insured—than what they would have to do anyway absent the challenged regulations.

2013 WL 6804773, at *12 ("Notre Dame isn't being required to do anything new or different—its action is the same, although, granted, the result is different due to the actions of the TPA and the government. As I've said, Notre Dame may find the act of opting out less spiritually fulfilling now, but that doesn't make it a new action."); *Priests for Life*, 2013 WL 6672400, at *8 ("This is where Plaintiffs' RFRA challenge must fail—like the challenges in *Kaemmerling* and *Bowen*, the accommodations to the contraceptive mandate simply do not require Plaintiffs to modify their religious behavior."). Any burden imposed by the purely administrative self-certification requirement—which should take Family Talk a matter of minutes—is, at most, *de minimis*, and thus cannot be "substantial" under RFRA.[10]

The mere fact that a plaintiff may claim that the self-certification requirement imposes a substantial burden on its religious exercise does not make it so. *See Priests for Life*, 2013 WL 6672400, at *8 n.5 ("[T]he Court is not persuaded . . . that a plaintiff can meet his burden of establishing that the accommodation creates a 'substantial burden' upon his exercise of religion simply because he claims it to be so."); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013) (same), *aff'd*, 724 F.3d 377 (3d Cir. 2013). Under RFRA, plaintiffs are entitled to their sincere religious beliefs, but they are not entitled to decide what does and does not impose a substantial burden on such beliefs. Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 917 F. Supp. 2d at 413. Plaintiffs would limit the Court's inquiry to two prongs: first, whether plaintiffs' religious objection to the challenged regulations are

[10] RFRA's legislative history makes clear that Congress did not intend such a relaxed standard. The initial version of RFRA prohibited the government from imposing *any* "burden" on free exercise, substantial or otherwise. Congress amended the bill to add the word "substantially," "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religious liberty. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see also id.* (text of Amendment No. 1082).

sincere, and second, whether the regulations apply significant pressure to plaintiffs to comply. But plaintiffs ignore a critical third criterion of the "substantial burden" test, which gives meaning to the term "substantial": whether the challenged regulations actually require plaintiffs to modify their behavior in a significant—or more than *de minimis*—way. *See Living Water Church of God v. Charter Twp. Of Meridian*, 258 Fed. App'x 729, 734-36 (6th Cir. 2007) (reviewing cases); *see also, e.g.*, *Garner*, 713 F.3d at 241; *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007).

The Tenth Circuit's decision in *Hobby Lobby* is not to the contrary. There, the court observed that, in determining whether an alleged burden is substantial, the court's "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." 723 F.3d at 1137. But, because the for-profit corporation plaintiffs in that case were not eligible for the accommodations (and thus were required to contract, arrange, and pay for contraceptive coverage), the court did not address whether an accommodation that requires a plaintiff to do nothing beyond satisfying a purely administrative self-certification requirement imposes a substantial burden on religious exercise. Indeed, the *Hobby Lobby* court relied heavily on *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), which makes clear that, for a law to impose a substantial burden, it must require some actual change in religious behavior—either forced participation in conduct or forced abstention from conduct. *See Hobby Lobby*, 723 F.3d at 1138 ("[A] government act imposes a 'substantial burden' on religious exercise if it: (1) '*requires participation* in an activity prohibited by a sincerely held religious belief,' (2) '*prevents participation in conduct* motivated by a sincerely held religious belief,' or (3) 'places substantial pressure on an adherent . . . *to engage in conduct* contrary to a sincerely held religious belief." (emphasis added) (citing *Abdulhaseeb*, 600 F.3d at 1315)). Because the challenged regulations require that Family Talk take the *de minimis* step that it would

have to take even in the absence of the regulations (and require nothing of Dr. Dobson), the regulations do not impose a substantial burden on plaintiffs' religious exercise.

The challenged regulations also do not impose a substantial burden on plaintiffs' religious exercise because any burden is indirect and too attenuated to be substantial. See *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375, at *4-5 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013) (addressing these regulations). The ultimate decision of whether to use contraception "rests not with [the employer], but with [the] employees" in consultation with their health care providers. *Conestoga*, 917 F. Supp. 2d at 414-15; *see e.g.*, *Autocam Corp. v. Sebelius*, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012) ("The incremental difference between providing the benefit directly, rather than indirectly, is unlikely to qualify as a substantial burden on the Autocam Plaintiffs."). Moreover, even if the challenged regulations were deemed to impose a substantial burden on plaintiffs' religious exercise, the regulations satisfy strict scrutiny because they are narrowly tailored to serve compelling governmental interests in public health and gender equality. Defendants recognize that a majority of the en banc Tenth Circuit rejected these arguments in *Hobby Lobby*, and that this Court is bound by that decision. The Supreme Court is currently reviewing the Tenth Circuit's decision. Defendants raise the arguments here merely to preserve them for appeal.

For these reasons, plaintiffs are not likely to succeed on their RFRA claim.

B. The Regulations Do Not Violate the Establishment Clause

Every court to have considered an Establishment Clause challenge to both these regulations and to the prior version of the regulations has rejected it. *See Notre Dame*, 2013 WL 6804773, at *18-20; *Priests for Life*, 2013 WL 6672400, at *14; *Roman Catholic Archbishop of Washington v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6729515, at *39-43 (D.D.C. Dec. 20, 2013); *Diocese of Nashville*, 2013 WL 6834375, at *8-10; *Michigan Catholic Conf.*, 2013 WL 6838707, at *11; see also, e.g., *O'Brien*, 894 F.

Supp. 2d at 1162 (upholding prior version of regulations); *Conestoga*, 917 F. Supp. 2d at 416-17; *Grote Indus. v. Sebelius*, 914 F. Supp. 2d 943, 954 (S.D. Ind. 2012), *rev'd on other grounds sub nom. Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013). This Court should do the same.

"The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over another" is subject to strict scrutiny. *Id.* at 246; *see also Olsen v. DEA*, 878 F.2d 1458, 1461 (D.C. Cir. 1989) (observing that "[a] statutory exemption authorized for one church alone, and for which no other church may qualify," creates a "denominational preference"). Thus, for example, the Supreme Court has struck down on Establishment Clause grounds a state statute that was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Larson*, 456 U.S. at 254; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703-07 (1994) (striking down statute that created special school district for religious enclave of Satmar Hasidim because it "single[d] out a particular religious sect for special treatment"). The Court, on the other hand, has upheld a statute that provided an exemption from military service for persons who had a conscientious objection to all wars, but not those who objected to only a particular war. *Gillette v. United States*, 401 U.S. 437 (1971). The Court explained that the statute did not discriminate among religions because "no particular sectarian affiliation" was required to qualify for conscientious objector status. *Id.* at 450-51. "[C]onscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic." *Larson*, 456 U.S. at 247 n.23; *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (upholding RLUIPA against Establishment Clause challenge because it did not "confer[] . . .

privileged status on any particular religious sect" or "single[] out [any] bona fide faith for disadvantageous treatment").

Like the statutes at issue in *Gillette* and *Cutter*, the preventive services coverage regulations do not grant any denominational preference or otherwise discriminate among religions. It is of no moment that the religious employer exemption and accommodations for eligible organizations apply to some employers but not others. "[T]he Establishment Clause does not prohibit the government from [differentiating between organizations based on their structure and purpose] when granting religious accommodations as long as the distinction[s] drawn by the regulations . . . [are] not based on religious affiliation." *Grote*, 914 F. Supp. 2d at 954; *accord O'Brien*, 894 F. Supp. 2d at 1163; *see also, e.g.*, *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090-93 (8th Cir. 2000); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (concluding that religious exemption from self-employment Social Security taxes did not violate the Establishment Clause even though "some individuals receive exemptions, and other individuals with identical beliefs do not"); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006) ("This kind of distinction—not between denominations, but between religious organizations based on the nature of their activities—is not what *Larson* condemns.").

Plaintiffs misread *Larson* in asserting that it establishes that the government may not distinguish between types of organizations when accommodating religion. *Larson* makes clear that the Establishment Clause is concerned with distinctions among *denominations*. *See, e.g.*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *id*. at 245-46 (referring to the "constitutional prohibition of denominational preferences" and the "principle of denominational neutrality"); *id*. at 245 ("Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or

unpopular denominations."); *id*. at 246 ("[T]he government must be neutral when it comes to competition between sects." (citation omitted)); *id*. ("[T]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects[.]" (citation omitted)). The constitutional problem with the statute in *Larson* was that it "effect[ed] the *selective* legislative imposition of burdens and advantages upon particular denominations." *Id*. at 254 (emphasis in original). It was drafted to "includ[e] particular religious denominations and exclud[e] others." *Id*. Indeed, the Court discussed the legislative history of the statute, which showed that language was changed during the legislative process "for the sole purpose of exempting the [Roman Catholic] Archdiocese from the provisions of the Act." *Id*. at 254.[11]

The distinctions established by the regulations at issue here are not distinctions among denominations. The regulations' definitions of religious employer and eligible organization "do[] not refer to any particular denomination." *Grote*, 914 F. Supp. 2d at 954. The exemption and accommodations are available on an equal basis to organizations affiliated with any and all religions.[12] Therefore, as every court to consider

[11] Plaintiffs also stretch *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), well beyond its facts in asserting that the case stands for the proposition that the Establishment Clause prohibits the government from distinguishing among different types of organizations that adhere to the same religion. The court's decision in *Weaver* was limited to "laws that facially regulate religious issues," *id*. at 1257, and, particularly, those that do so in a way that denies certain religious institutions public benefits that are afforded to all other institutions, whether secular or religious. The court in *Weaver* said nothing about the constitutionality of exemptions from generally applicable laws that are designed to accommodate religion, as opposed to discriminate against religion. A requirement that any religious exemption that the government creates must be extended to all organizations—no matter their structure or purpose—would severely hamper the government's ability to accommodate religion. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("There is ample room under the Establishment Clause for 'benevolent' neutrality which will permit religious exercise to exist without sponsorship and without interference."); *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 464 ("To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion.").

[12] As explained below, *see infra* n.15, the other supposed exemptions mentioned by plaintiffs (Pls.' Mem. at 19-22) are not exemptions from the preventive services coverage provision, and, in any event, none of those provisions draw distinctions among denominations. Furthermore, contrary to plaintiffs' suggestion, *see* Pls.' Mem. at 4, 20, eligible organizations that utilize self-insured church plans are eligible for the accommodations. The defendant agencies, however, lack authority to require the TPAs of self-insured church plans to provide payments for contraceptive services because such plans are exempt from the Employee Retirement Income Security Act (ERISA). *See* 29 U.S.C. § 1003(b)(2). ERISA's exemption for church plans also does not distinguish among denominations.

the question has held, the regulations do not discriminate among religions in violation of the Establishment Clause. *See infra*; *see also Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 100-102 (4th Cir. 2013) (upholding another religious exemption contained in the ACA against an Establishment Clause challenge because the exemption "makes no explicit and deliberate distinctions between sects" (quotation omitted)).

The Supreme Court has "frequently articulated" that "there is space between the religion clauses, in which there is 'room for play in the joints;' government may encourage the free exercise of religion by granting religious accommodations, even if not required by the Free Exercise Clause, without running afoul of the Establishment Clause." *O'Brien*, 894 F. Supp. 2d at 1163 (citations omitted). Accommodations of religion are possible because the type of legislative line-drawing to which plaintiffs object in this case is constitutionally permissible. *Id.*; *Conestoga*, 917 F. Supp. 2d at 417; *see, e.g.*, *Walz v. Tax Commission of New York*, 397 U.S. 664, 672-73 (1970) (upholding property tax exemption "to religious organizations for religious properties used solely for religious worship"); *Amos*, 483 U.S. at 334 (upholding Title VII's exemption for religious organizations). Plaintiffs' Establishment Clause claim, therefore, lacks merit.[13]

C. The Regulations Do Not Violate the Free Exercise Clause

A law that is neutral and generally applicable does not run afoul of the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or

[13] Plaintiffs also assert that the government's rationale for distinguishing between houses of worship and their integrated auxiliaries and other non-profit religious organizations does not necessarily apply to Family Talk's employees, who may be as likely to share the organization's religious beliefs as the employees of a house of worship or integrated auxiliary. *See* Pls.' Mem. at 19. Even assuming this assertion is true, it does not render the distinctions drawn by the government—which are based on the general characteristics of houses of worship and integrated auxiliaries as compared to those of other non-profit religious organizations, and not the characteristics of the specific organizational plaintiff here—unlawful. *See, e.g.*, *Turner Construction Co. v. United States*, 94 Fed. Cl. 561, 571 (Fed. Cl. 2010) (observing that a reviewing court is not to "sift through an agency's rationale with a fine-toothed comb;" instead, the relevant question is whether the agency articulated a rational connection between the facts found and the choice made). Moreover, defendants' decision to incorporate long-standing concepts from the tax code that refer to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order, in an effort to avoid entangling inquiries regarding the religious beliefs of Family Talk's employees, is reasonable.

has the incidental effect of burdening a particular religious practice. *Empt. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). "Neutrality and general applicability are interrelated." *Lukumi*, 508 U.S. at 531. A law is neutral if it does not target religiously motivated conduct either on its face or as applied. *Id*. at 533. A neutral law has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Id*. at 545. A law is generally applicable so long as it does not selectively impose burdens only on conduct motivated by religious belief. *Id*.

Unlike such selective laws, the preventive services coverage regulations are neutral and generally applicable. Indeed, every court to have considered a free exercise challenge to these regulations has rejected it, concluding that the regulations are neutral and generally applicable. *See Priests for Life*, 2013 WL 6672400, at * 10-12, *Notre Dame*, 2013 WL 6804773, at *14-18; *Archbishop of Washington*, 2013 WL 6729515, at *27-31; *Diocese of Nashville*, 2013 WL 6834375, at *5-7; *Michigan Catholic Conf.*, 2013 WL 6838707, at *8-9.[14] "The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *O'Brien*, 894 F. Supp. 2d at 1161; *see Notre Dame*, 2013 WL 6804773, at *16 ("The laws and regulations in question, as well as the legislative history, further show that the ACA and related regulations were enacted for reasons neutral to religion."). The regulations reflect expert medical recommendations about the medical necessity of contraceptive

[14] Likewise, nearly every court to have considered a free exercise challenge to the prior version of the regulations rejected it. *See MK Chambers Co. v. U.S. Dep't of Health & Human Servs.,* Civil Action No. 13–11379, 2013 WL 1340719, at *5 (E.D. Mich. Apr. 3, 2013); *Eden Foods, Inc. v. Sebelius*, 2013 WL 1190001, at *4-5 (E.D. Mich. Mar. 22, 2013); *Conestoga*, 917 F. Supp. 2d at 409-10; *Grote*, 914 F. Supp. 2d at 952-53; *Autocam*, 2012 WL 6845677, at *5; *Korte v. HHS*, 912 F. Supp. 2d 735, 744-47 (S.D. Ill. 2012), *rev'd on other grounds sub nom. Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1289-90 (W.D. Okla. 2012), *rev'd on other grounds*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (2013); *O'Brien*, 894 F. Supp. 2d at 1160-62; *see also Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468-69 (rejecting similar challenge to state law); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81-87 (Cal. 2004). *But see Sharpe Holdings, Inc. v. HHS*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012); *Geneva Coll. v. Sebelius*, No. 2:12–cv–00207, 2013 WL 838238, at *24-26 (W.D. Penn. Mar. 6, 2013).

services, without regard to any religious motivations for or against such services. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 410 ("It is clear from the history of the regulations and the report published by the Institute of Medicine that the purpose of the [regulations] is not to target religion, but instead to promote public health and gender equality."); *Notre Dame*, 2013 WL 6804773, at *17 (same, and finding it "abundantly clear" that the regulations are neutral).

The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545; *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (concluding law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable). The regulations apply to all non-grandfathered health plans that do not qualify for the religious employer exemption or the accommodations for eligible organizations. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see O'Brien*, 894 F. Supp. 2d at 1162; *Autocam*, 2012 WL 6845677, at *5; *Grote*, 914 F. Supp. 2d at 953.

Contrary to plaintiffs' assertion, the Tenth Circuit has made clear that the existence of "express categorical exceptions for objectively defined categories of [entities]," like grandfathered plans and religious employers, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see also Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) (refusing to "interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption"); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 698, 701 (10th Cir. 1998) (concluding school's attendance policy was not subject to strict scrutiny despite exemptions for "strict categories of students," such as fifth-year seniors and special education students). The exception for grandfathered plans is available on equal terms to all employers, whether

religious or secular. And the religious employer exemption and eligible organization accommodations serve to accommodate religion, not to disfavor it. Such categorical exceptions do not trigger strict scrutiny. *See, e.g.*, *Priests for Life*, 2013 WL 6672400, at *11; *Notre Dame*, 2013 WL 6804773; Autocam, 2012 WL 6845677, at *5; O'Brien, 894 F. Supp. 2d at 1162.[15]

"[C]arving out an exemption for defined religious entities [also] does not make a law non-neutral as to others." *Grote*, 914 F. Supp. 2d at 953 (quotation omitted). Indeed, the religious employer exemption "presents a strong argument in favor of neutrality" by "demonstrating that the object of the law was not to infringe upon or restrict practices because of their religious motivation." *O'Brien*, 894 F. Supp. 2d at 1161 (quotations omitted); *see Conestoga*, 917 F. Supp. 2d at 410 ("The fact that exemptions were made for religious employers . . . . shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality."). The regulations are not rendered unlawful "merely because the [religious employer exemption] does not extend as far as Plaintiffs wish." *Grote*, 914 F. Supp. 2d at 953.

Plaintiffs' repeated reliance on *Lukumi*, 508 U.S. 520, is of no help, as this case is a far cry from *Lukumi*, where the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," *id*. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id*. at 535-36. Here, there is no indication that the regulations

[15] Grandfathering is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. Moreover, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. *See* 78 Fed. Reg. at 39,887 n.49, AR at 19; *see also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190 (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011), AR at 663-64, 846.

The other supposed exemptions plaintiffs mention (Pls.' Mem. at 21-22 (citing 26 U.S.C. § 5000A(d)(2)(A) and (B))) are entirely unrelated to the preventive services coverage provision. These provisions exempt certain individuals from the minimum coverage provision, which requires certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty.

are anything other than an effort to increase women's access to and utilization of recommended preventive services. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1161; *Conestoga*, 917 F. Supp. 2d at 410. And it cannot be disputed that defendants have made extensive efforts—through the religious employer exemption and the eligible organization accommodations—to accommodate religion in ways that will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost sharing.[16] Accordingly, plaintiffs' free exercise claim fails.[17]

D. The Regulations Do Not Violate the Free Speech Clause

Plaintiffs' free speech claim fares no better. The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006). But the preventive services coverage regulations do not "compel speech"—by plaintiffs or any other person, employer, or entity—in violation of the First Amendment. Nor do they limit what plaintiffs may say. Plaintiffs remain free under the regulations to express whatever views they may have on the use of contraceptive services (or any other health care services) as well as their views about the regulations. Plaintiffs, moreover, may encourage Family Talk's employees not to use contraceptive services.

As plaintiffs point out, to avail itself of an accommodation, an organization must self-certify that it meets the definition of "eligible organization." Plaintiffs appear to object to the self-certification to the extent that it results in Family Talk's TPA making separate

[16] *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), on which plaintiffs also rely, addressed a policy that created a secular exemption but refused all religious exemptions. The challenged regulations, in contrast, contain an exemption and accommodations that specifically seek to accommodate religion. Thus, there is simply no basis in this case to infer a discriminatory object behind the regulations. *See Conestoga*, 917 F. Supp. 2d at 409-10.

[17] Contrary to plaintiffs' assertion, *see* Pls.' Mem. at 28, even if the regulations were not neutral or generally applicable, plaintiffs would still be required to demonstrate that the regulations substantially burden their religious exercise to prevail on their free exercise claim, *see Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant's religious practice."), which they cannot do for the reasons explained above.

payments for contraceptive services for its employees. But completion of the simple self-certification form is "plainly incidental to the . . . regulation of conduct," *FAIR*, 547 U.S. at 62, not speech. Indeed, every court to review a free speech challenge like plaintiffs' as to both the challenged regulations and the prior contraceptive-coverage regulations has rejected it, in part, because the regulations deal with conduct. *See Priests for Life*, 2013 WL 6672400, at *12-14 ("The regulations regarding contraceptive coverage, including the accommodation, place no limits on what Plaintiffs may say; they remain free to oppose contraceptive coverage for all people and in all forms. Rather, the accommodation regulates conduct . . . And like the law schools in *FAIR*, the only speech the accommodations require of Priests for Life is incidental to the regulation of conduct."); *Notre Dame*, 2013 WL 6804773, at *20-21; *Archbishop of Washington*, 2013 WL 6729515, at *31-36; *Diocese of Nashville*, 2013 WL 6834375, at *7-8; *Michigan Catholic Conf.*, 2013 WL 6838707, at *9-10; *see also, e.g.*, *MK Chambers*, 2013 WL 1340719, at *6; *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109 (D. Colo. 2013); *Conestoga*, 917 F. Supp. 2d at 418; *Grote*, 914 F. Supp. at 955; *Autocam*, 2012 WL 6845677, *8; *O'Brien*, 894 F. Supp. 2d at 1165-67; *see also Catholic Charities of Sacramento*, 85 P.3d at 89; *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 465. The accommodations likewise regulate conduct by relieving an eligible organization of the obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. Plaintiffs' suggestion that the mere act of self-certifying eligibility for a religious accommodation violates speech rights is baseless. *See FAIR*, 547 U.S. at 61-63.

Similarly flawed is plaintiffs' claim that they are barred from expressing particular views to Family Talk's TPA. Pls.' Mem. at 30. Defendants have been clear that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraception." 78 Fed. Reg. at 39,880 n.41, AR at 12. What the regulations prohibit is an employer's improper attempt to interfere with its employees'

ability to obtain contraceptive coverage from a third party by, for example, threatening the TPA with a termination of its relationship with the employer because of the TPA's "arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries." *See* 26 C.F.R. § 54.9815-2713A(b)(1)(iii); 29 C.F.R. § 2590.715-2713A(b)(1)(iii).

Addressing an analogous argument in the context of the National Labor Relations Act, the Supreme Court concluded that an employer's threatening statements to its employees regarding the effects of unionization fell outside the protection of the First Amendment because they interfered with employee rights. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The Court explained that there was no First Amendment violation because the employer was "free to communicate . . . any of his general views . . . so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id*.; *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The same is true here. Because the regulations do not prevent plaintiffs from expressing their views regarding the use of contraceptive services, but rather, protect employees' right to obtain payments for contraceptive services through issuers/TPAs, there is no infringement of plaintiffs' right to free speech.

III. PLAINTIFFS CANNOT ESTABLISH THE REMAINING ELEMENTS FOR A PRELIMINARY INJUNCTION

Plaintiffs have not established that they are likely to suffer irreparable harm in the absence of preliminary relief because, as explained above, they have not shown a likelihood of success on the merits of their RFRA or First Amendment claims. *See Hobby Lobby*, 723 F.3d at 1146 (explaining that, in the RFRA and First Amendment context, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits).

As to the balance of equities and the public interest, "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) (indicating that granting an injunction against the enforcement of a likely constitutional statute would harm the government). Enjoining the preventive services coverage regulations as to Family Talk would undermine the government's ability to achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women and men.

It would also be contrary to the public interest to deny Family Talk's employees (and their families) the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Those employees and their covered family members should not be deprived of the benefits of payments provided by a third party that is not their employer for the full range of FDA-approved contraceptive services, as prescribed by a health care provider, on the basis of their employer's religious objection. Many women do not use contraceptive services because they are not covered by their health plan or require costly copayments, coinsurance, or deductibles. IOM REP. at 19-20, 109, AR at 317-18, 407; 77 Fed. Reg. at 8727, AR at 214; 78 Fed. Reg. at 39,887, AR at 19. As a result, in many cases, both women and developing fetuses suffer negative health consequences. *See* IOM REP. at 20, 102-04, AR at 318, 400-02; 77 Fed. Reg. at 8728, AR at 215. And women are put at a competitive disadvantage due to their lost productivity and the disproportionate financial burden they bear in regard to preventive health services. 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* IOM REP. at 20, AR at 318.

Enjoining defendants from enforcing, as to Family Talk, the preventive services

coverage regulations—the purpose of which is to eliminate these burdens, 75 Fed. Reg. at 41,733, AR at 233; *see also* 77 Fed. Reg. at 8728, AR at 215—would thus inflict a very real harm on the public and, in particular, a readily identifiable group of individuals. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (vacating preliminary injunction entered by district court and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications"). Accordingly, even assuming plaintiffs were likely to succeed on the merits (which they are not for the reasons explained above), any potential harm to plaintiffs resulting from their offense at a third party providing payment for contraceptive services—at no cost to, and with no administration by, plaintiffs—would be outweighed by the significant harm an injunction would cause Family Talk's employees and their families.

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court deny plaintiffs' motion for preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michelle R. Bennett
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